

EXHIBIT 57

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BMG RIGHTS MANAGEMENT : NO. 1:14-cv-1611
(US) LLC, and ROUND : (LOG/JFA)
HILL MUSIC LP, :
Plaintiffs :
vs. :
COX ENTERPRISES, :
INC., COX :
COMMUNICATIONS, INC., :
COXCOM, LLC, :
Defendants :

* * *

MONDAY, AUGUST 10, 2015

* * *

Videotaped deposition of RALPH OMAN
taken at the law offices of Steptoe &
Johnson, 1330 Connecticut Avenue NW,
Washington, DC, commencing at 9:39 a.m.
before Debbie Leonard, Registered Diplomate
Reporter, Certified Realtime Reporter.

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15
16 ALSO PRESENT:

17
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1 THE VIDEOGRAPHER: We are now
2 on record.

3 Please note that the
4 microphones are sensitive and may pick
5 up whispering and private
6 conversations.

7 Please turn off all cell phones
8 or place them away from the
9 microphones, as they can interfere
10 with the deposition audio.

11 Recording will continue until
12 all parties agree to go off the
13 record.

14 My name is Mikko Goodhill,
15 representing Veritext. The date today
16 is Monday, August 10th, 2015, and the
17 time is approximately 9:39 a.m.

18 This deposition is being held
19 at Steptoe & Johnson located at 1330
20 Connecticut Avenue Northwest,
21 Washington, D.C., 20036 and is being
22 taken by counsel for the defense.

23 The caption of this case is BMG
24 Rights Management LLC, et al., versus
25 Cox Enterprises, Incorporated. The

1 case is filed in the United States
2 District Court for the Eastern
3 District of Virginia, case
4 number 1:14-cv-1611 (LOG/JFA).

5 The name of the witness today
6 is Ralph Oman.

7 At this time, the attorneys
8 present in the room can identify the
9 parties they represent.

10 MR. BRIDGES: This is Andrew
11 Bridges of Fenwick & West representing
12 the defendants. And with me from my
13 right are Guinevere Jobson, Armen
14 Nercessian, and David Hayes.

15 MR. GENNARI: Paul Gennari of
16 Steptoe & Johnson for the plaintiffs
17 and for Mr. Oman.

18 THE VIDEOGRAPHER: Okay. All
19 right. Our court reporter, Debbie
20 Leonard, representing Veritext, will
21 swear in the witness and we can
22 proceed.

23 * * *

24 RALPH OMAN,
25 having been first duly sworn, testified as

1 follows:

2 * * *

3 EXAMINATION

4 * * *

5 BY MR. BRIDGES:

6 Q. Good morning, Mr. Oman.

7 A. Good morning, Mr. Bridges.

8 Q. You've been deposed many times,
9 correct?

10 A. Yes.

11 Q. Approximately how many times?

12 A. Probably 25 or 30 times.

13 Q. And you've had time to meet
14 with counsel to prepare for today's
15 deposition?

16 A. Yes.

17 Q. Approximately -- strike that.
18 What did you do to prepare for
19 today's deposition?

20 A. To prepare for the deposition,
21 I reviewed my expert report. I went through
22 the exhibits, not as thoroughly as I did in
23 preparing the report, but I went through
24 them. And I reviewed the other documents
25 that I've cited in my report. And I

1 those conversations throughout the process."

2 Aren't the WIPO 1996 treaties
3 often referred to as the Internet treaties?

4 A. They are. That's where I must
5 have misspoke. There were two tracks going,
6 one of them the WIPO, for updating the Berne
7 Convention, starting in 1886 [sic] through
8 1993 when I left, and at that point those
9 negotiations for the updating of the Berne
10 Convention were put aside and they focused
11 exclusively on the -- well, actually, it's
12 more complicated than that, but for
13 simplicity's sake, let me say that they
14 focused on the Internet issues, they focused
15 on folklore, and they focused on
16 broadcasters, all part of the update of the
17 Berne Convention.

18 But at that point I stepped
19 aside. Bruce Lehman became head of the US
20 delegation, who was the Commissioner of
21 Patents and Trademarks at that time,
22 L-E-H-M-A-N. And they put aside the
23 broadcasters treaty, they put aside
24 protection of folklore, and they went forward
25 on the Internet treaties.

1 So I was not the head of the US
2 delegation during the final stages of that
3 negotiation which adopted the Internet
4 treaties.

5 Q. By "the Internet treaties,"
6 you're referring to the 1996 copyright treaty
7 and the -- is it Performances and Phonograms
8 Treaty or did I get it backwards? Is it --

9 A. No. The WCT -- WIPO Copyright
10 treaty and the WPPT. The WIPO Phonograms --
11 Performances and Phonograms Treaty. You had
12 it right.

13 * * *

14 (Exhibit Oman-4 marked for
15 identification.)

16 * * *

17 BY MR. BRIDGES:

18 Q. Okay. Exhibit 4 is a copy of
19 the WIPO Copyright treaty, which you've just
20 been referring to; is that correct?

21 A. Yes.

22 Q. And in paragraph 11 of your
23 report, you start out by saying, "I have also
24 been a frequent delegate to the meetings at
25 the WIPO in Geneva, including the series of

1 meetings that culminated in the 1996
2 diplomatic conference that modernized the
3 Berne Convention and resulted in the passage
4 of the Digital Millennium Copyright Act of
5 1998 in the United States," correct?

6 A. Yes.

7 Q. Is the treaty in Exhibit 4 one
8 step that resulted in the passage of the
9 Digital Millennium Copyright Act of 1998 in
10 the United States?

11 A. There were other factors but
12 this was one of the factors that resulted in
13 the passage of the DMCA.

14 Q. And you were a frequent
15 delegate to the meetings that led to the WIPO
16 Copyright treaty in Exhibit 4?

17 A. Yes.

18 Q. Your phrase is "I have also
19 been a frequent delegate." Who delegated you
20 to attend those meetings?

21 A. I was part of the composers
22 delegation.

23 Q. Composers delegation?

24 A. Yes.

25 Q. And by composers, do you mean

1 songwriters?

2 A. Songwriters. I also was
3 representing the -- if I recall correctly,
4 the American Bar Association.

5 Q. So who else was in the
6 composers delegation for the WIPO Copyright
7 treaty negotiations?

8 A. The general counsel of BMI, the
9 general counsel of ASCAP, the president of
10 ASCAP actually was there on one occasion, a
11 famous songwriter herself.

12 And the international component
13 was there as well. The representative from
14 GEMA, the German collecting rights society,
15 G-E-M-A. We had the head of CISAC. It's in
16 French, but let me try to translate it. The
17 Confederation -- International Confederation
18 of Societies of Authors and Composers,
19 C-I-C-A-C [sic].

20 Q. In the process leading up to
21 the enactment of the Digital Millennium
22 Copyright Act, I think you said you did not
23 give any testimony before Congress; is that
24 correct?

25 A. That's correct.

1 with.

2 BY MR. BRIDGES:

3 Q. Do you understand whether
4 making available requires any transmission --
5 strike that.

6 Do you understand whether
7 making a work available over the Internet
8 requires any transmission at all?

9 MR. GENNARI: Objection. Vague
10 and ambiguous. Outside the scope of
11 his report.

12 THE WITNESS: In my opinion,
13 no.

14 BY MR. BRIDGES:

15 Q. What part of Section 106 does
16 making available -- strike that.

17 Is it your contention that
18 making a work available violates copyright
19 law?

20 A. Yes.

21 Q. Is it your opinion that making
22 something available violates some part of
23 Section 106?

24 A. I should have qualified that.
25 Making it available without authorization

1 violates 106 of the copyright law,
2 specifically the distribution right.

3 Q. What types of -- strike that.

4 Does -- in your view, does
5 making something available on the Internet
6 violate any other subsections of Section 106?

7 A. Not -- not to -- I'd say the
8 answer is no, although under certain
9 circumstances I can imagine the reproduction
10 right also being implicated.

11 Q. How?

12 A. I don't know.

13 Q. So when you say -- earlier you
14 said making it available without
15 authorization violates Section 106 of the
16 copyright law, specifically the distribution
17 right. You were referring to Section 106(3),
18 correct?

19 A. Yes.

20 MR. GENNARI: Objection.

21 Misstates his prior testimony.

22 BY MR. BRIDGES:

23 Q. What does a copyright holder
24 have the exclusive right to distribute under
25 Section 106(3) of the Copyright Act?

1 A. The -- do we have a copy of
2 106?

3 Q. I'm just asking based on your
4 expertise right now. And we can look at it
5 later --

6 A. I'd prefer to go to the
7 document.

8 Q. I understand that. But just
9 based on your residual knowledge --

10 A. I won't answer.

11 Q. Sorry?

12 A. I won't answer without the
13 document in front of me.

14 Q. I'd like everything you can
15 tell me about what a copyright owner has the
16 right to distribute under Section 106(3)
17 before we turn to the statute.

18 MR. GENNARI: Asked and
19 answered. He's already explained to
20 you he's not comfortable answering
21 legal questions about statutes without
22 the statute in front of him, and if
23 you can offer him the courtesy and
24 give him the courtesy -- if you'd
25 like, I can get him the document

1 myself, Section 106 of the statute.

2 THE WITNESS: With all due
3 respect, I have difficulty
4 understanding you when you've got your
5 hand in front of your mouth.

6 BY MR. BRIDGES:

7 Q. Okay. So I'll say -- thank
8 you.

9 I'd like everything you can
10 tell me about what a copyright owner has the
11 right to distribute under Section 106(3)
12 before we turn to the statute.

13 MR. GENNARI: Same objection.

14 THE WITNESS: Well, this is a
15 very complicated legal issue,
16 actually. I think you probably
17 appreciate that. And I would be
18 reluctant to voice an opinion on it in
19 a very nuanced area of the law in
20 which there are conflicts in the
21 circuits and not clarity that would --
22 we'd hope to have in this area of the
23 law.

24 BY MR. BRIDGES:

25 Q. Well, just -- just based on

1 your understanding of the statute and the
2 statutory language, please tell me everything
3 you can about what the statute says about
4 what a copyright owner has the right to
5 distribute, the exclusive right to
6 distribute, under Section 106(3) of the
7 Copyright Act.

8 MR. GENNARI: Same objection.
9 He's not a memory test. You're asking
10 him specific language about the
11 statute without giving it to him to
12 see in front of him, and he's already
13 asked for it. So the objection
14 stands.

15 THE WITNESS: I say again, I'm
16 sorry. This is a very complicated
17 area of the law. I've not had the
18 opportunity to review the provisions
19 you're talking about in the law. And
20 I would -- I would prefer not to
21 answer that, tell you at this point
22 all I know about the subject, since I
23 might miss something important.

24 BY MR. BRIDGES:

25 Q. So just tell me the -- and I

1 respect that. What do you recall now about
2 what is important about the particular things
3 that a copyright owner has the right to
4 distribute in Section 106(3) of the Copyright
5 Act?

6 MR. GENNARI: Same objections.

7 BY MR. BRIDGES:

8 Q. And if you want to add things
9 in later, that's fine.

10 A. And if I want to --

11 Q. Add more later, that's fine.
12 I'm just asking what you know sitting here
13 are the things that Section 106(3) says that
14 the copyright owner has the exclusive right
15 to distribute.

16 MR. GENNARI: Same objections.

17 THE WITNESS: You're -- the
18 preamble to 106 is very important, and
19 you've not mentioned that.

20 BY MR. BRIDGES:

21 Q. Well, I understand that. So if
22 you -- if that helps you add to your answer,
23 that's fine. But I'm focusing on 106(3), and
24 you can add from the preamble. But what are
25 the things that you think are important in

1 Section 106(3) that the Copyright Act gives
2 the exclusive right to the copyright holder
3 to distribute? What are the things that the
4 copyright holder has that exclusive right to
5 distribute?

6 MR. GENNARI: Same objection.

7 It's about time you put the statute in
8 front of him, I would think.

9 THE WITNESS: In the online
10 environment, a copy of a sound
11 recording.

12 BY MR. BRIDGES:

13 Q. What else?

14 A. That's all I can think of off
15 the top of my head.

16 Q. And what types of transactions
17 does Section 106(3) give the copyright holder
18 the exclusive right to engage in, in
19 distributing objects?

20 MR. GENNARI: Same objection.

21 Asking him to answer a question
22 without the statute in front of him,
23 which he's already asked for.

24 THE WITNESS: I would prefer
25 not to answer that without refreshing

1 my recollection.

2 BY MR. BRIDGES:

3 Q. Well, what -- and that's fine,
4 but I'd like to understand what your
5 recollection is now, and then we can refresh
6 it later.

7 What is your recollection now
8 about the types of transactions with respect
9 to distribution that the copyright owner has
10 the exclusive right over?

11 MR. GENNARI: Same objections.
12 And outside the scope of his report.

13 THE WITNESS: The negotiations
14 that led up to the adoption of the
15 Internet treaties and the United
16 States participated actively in that
17 proceeding, and required -- the
18 diplomatic conference decided that
19 they would authorize the making
20 available right.

21 The United States delegation
22 was of the view that the distribution
23 right in American law, in US law,
24 would cover all of our obligations
25 under the -- under the treaties in

1 Register of Copyrights, who is here as
2 an expert on copyright law generally,
3 about the very type of infringement
4 that he seems to believe is at the
5 heart of this case.

6 And I'm entitled to gain the
7 benefit of his expertise before I show
8 him the statute.

9 BY MR. BRIDGES:

10 Q. So I'm asking you, Mr. Oman,
11 what types of transactions does the United
12 States Copyright Act, Section 106(3), give
13 the copyright owner the exclusive power to
14 engage in in connection with distribution of
15 certain types of things, gives him the power
16 to do or to authorize, but I'm looking for
17 what types of transactions the section
18 pertains to.

19 MR. GENNARI: Same objections.

20 THE WITNESS: I thought I
21 already gave you an example.

22 BY MR. BRIDGES:

23 Q. I'm asking what the statute
24 says.

25 MR. GENNARI: Same objections.

1 THE WITNESS: I would not --
2 without looking at the statute and any
3 provisions that are related to it, I
4 don't want to give you an answer off
5 the top of my head.

6 BY MR. BRIDGES:

7 Q. Can you recall any single type
8 of transaction that Section 106(3) refers to
9 in the context of the rights of a copyright
10 holder?

11 A. Oh, certainly. The sale of
12 books over the Internet.

13 Q. Any other types of
14 transactions?

15 A. All distributions would be
16 covered by the right to distribute.

17 Q. Actually, doesn't --

18 A. Well, I mean -- I overstated
19 the case. But all of the normal transactions
20 we consider, sales online, sales in book
21 stores, sales through the mail, they would
22 all fall within the authority of the
23 copyright owner.

24 Q. What sales did Rightscorp
25 identify in this case?

1 A. I don't know.

2 Q. Are you aware of Rightscorp
3 identifying any sale by any Cox subscriber?

4 MR. GENNARI: Objection.

5 Outside the scope of his report.

6 THE WITNESS: Not that I
7 recall.

8 BY MR. BRIDGES:

9 Q. Do you know whether
10 Rightscorp's technological system discerns
11 when a sale is made or not?

12 A. I don't think it does.

13 Q. What other types of
14 transactions does Section 106(3) of the
15 Copyright Act cover?

16 MR. GENNARI: Same objections.

17 BY MR. BRIDGES:

18 Q. Or refer to.

19 A. I'm not prepared to answer
20 further on that topic.

21 Q. Okay. You -- in responding to
22 my question about Section 106, you referred
23 to discussions surrounding the relationship
24 of the US distribution right to the concept
25 of making available under the WIPO Copyright

1 Treaty, correct?

2 A. Correct.

3 Q. Please turn to the WIPO
4 Copyright Treaty in Exhibit 4 and tell me to
5 which portions of the copyright treaty does
6 the US distribution right pertain?

7 A. If you could point me in the
8 right direction, that would certainly help.
9 This is the right of distribution, Article 6?

10 Q. Well, I'm asking you.

11 A. Well, I didn't review this
12 provision or the document recently. I would
13 be happy to do it.

14 Q. Well, I believe that the right
15 of distribution is probably a right place,
16 and perhaps the right of rental in Articles 6
17 and 7.

18 A. And the right of communication
19 to the public?

20 Q. Well, I was going to ask you
21 about that.

22 So right of distribution, right
23 of rental, you think maybe right of
24 communication to the public?

25 MR. GENNARI: I'm sorry. Is

1 Q. Okay. Where -- what provisions
2 of the WIPO Copyright Treaty are analogous to
3 the rights of public display in Section
4 106(5) of the US Copyright Act? Which
5 articles correspond to that?

6 MR. GENNARI: Same objection.

7 THE WITNESS: That's an issue
8 I've not focused on, and I could give
9 you an answer if you wanted me to
10 spend the time to review the document.

11 BY MR. BRIDGES:

12 Q. Well, look at Article 8 and
13 tell me if that does not also correspond to
14 the right of public display under --

15 MR. GENNARI: Object --

16 BY MR. BRIDGES:

17 Q. -- Section 106(5) of the
18 Copyright Act?

19 MR. GENNARI: Same objection.
20 You're refusing to show him the 106
21 statute and asking him to make legal
22 judgments and conclusions based on
23 documents you're unwilling to show him
24 and which he's already asked for
25 several times.

1 THE WITNESS: Article 8, does
2 it refer -- does it also incorporate
3 the exclusive rights that are in
4 Section 106(5) of the US Copyright
5 Act?

6 BY MR. BRIDGES:

7 Q. Right. Relating to public
8 display.

9 A. Making them available, and
10 we're talking about copyrighted works, not
11 works covered by neighboring rights? We're
12 talking about --

13 Q. Copyrighted works.

14 A. -- copyrighted works. That
15 would bear on it as well.

16 Q. So Article 8 would correspond
17 to the Section 106(5) right of public display
18 of a copyright holder under the --

19 A. In my opinion, yes, though I've
20 not studied that issue in detail. It's never
21 been a controversy I focused on.

22 Q. What about articles -- sorry.
23 What about -- strike that.

24 Does Article 8 also correspond
25 to Sections 106(4) and 106(6) of the

1 Copyright Act relating to public performances
2 and the right of public performance under the
3 Copyright Act?

4 MR. GENNARI: Same objections.
5 Outside the scope of his report. The
6 documents would speak for themselves,
7 if we could see them.

8 THE WITNESS: The right of
9 public performance, the right of a
10 sound recording to enjoy a public
11 performance right for digital
12 transmissions of its works?

13 BY MR. BRIDGES:

14 Q. And a right of public
15 performance of an audiovisual work under
16 Section 106(4). Do those rights of public
17 performance correspond to the right of
18 communication to the public in Article 8 of
19 the WIPO Copyright Treaty?

20 MR. GENNARI: Same objections.
21 Calls for a legal conclusion. Outside
22 the scope of his report.

23 THE WITNESS: The works, again,
24 you're referred to just a second ago?

25 BY MR. BRIDGES:

1 Q. Audiovisual works or sound
2 recordings or --

3 A. Sound recordings, of course,
4 wouldn't be covered by the WCT.

5 Q. Why not?

6 A. Because they're neighboring
7 rights.

8 Q. So the WIPO Copyright Treaty
9 does not have a bearing on rights relating to
10 sound recordings?

11 A. Not unless you're talking about
12 the underlying music.

13 Q. Okay. So the WIPO Copyright
14 Treaty does relate to the right of public
15 performance of musical compositions?

16 A. Yes.

17 Q. And that right of public
18 performance would correspond to the
19 Article 8, right of communication to the
20 public, in the --

21 A. That's my understanding, but
22 I've not studied this issue recently at any
23 depth.

24 Q. Please show me where in the
25 WIPO Copyright Treaty it refers to the right

1 of making available?

2 A. I'm not sure it does. I've not
3 parsed out the language, but certainly when
4 they talked about these articles, they were
5 talking about rights of authors as we
6 understand them.

7 Q. And Article 6 is the right of
8 distribution, right?

9 MR. GENNARI: Same objections.

10 BY MR. BRIDGES:

11 Q. That's what it says here?

12 A. Yes.

13 Q. That's the title of Article 6,
14 "The Right of Distribution"?

15 A. Yes.

16 Q. Article 7 is "The Right of
17 Rental," correct? Correct?

18 A. That's what it says.

19 Q. And Article 8 is "The Right of
20 Communication to the Public" --

21 A. Right.

22 Q. -- right?

23 Do you notice that in the right
24 of distribution in Section -- in Article 8 --
25 strike that.

1 Do you notice that in the right
2 of distribution in Article 6 it indicates
3 the -- it uses the phrase "making available"?

4 A. You're asking me to confirm
5 that it says "making available"?

6 Q. Yes.

7 A. Yes.

8 Q. And it says, "Authors of
9 literary and artistic works shall enjoy the
10 exclusive right of authorizing the making
11 available to the public of the original and
12 copies of their works through sale or other
13 transfer of ownership," right?

14 A. Right.

15 Q. What -- based on your
16 involvement in the diplomatic activities
17 leading up to the formation of the treaty,
18 what did you understand "original and copies"
19 to mean?

20 MR. GENNARI: Objection.

21 Outside the scope of his report.

22 THE WITNESS: I don't recall
23 the precise meaning of those terms.
24 There could be a technical
25 explanation. There could be an

1 explanation vis-à-vis the Berne
2 Convention. I'm not entirely sure at
3 this point.

4 BY MR. BRIDGES:

5 Q. Do you recall whether there's a
6 correspondence between the meaning of the
7 word "copies" in Article 6 of the WIPO
8 Copyright Treaty and the meaning of "copies"
9 in Section 101 of the Copyright Act and the
10 meaning of "copies" as used in Section 106(3)
11 of the Copyright Act?

12 MR. GENNARI: Same objection.
13 Outside the scope of his report.

14 THE WITNESS: There may be a
15 connection, but I don't recall at this
16 point whether there was a direct
17 correlation during the negotiation of
18 the provision.

19 BY MR. BRIDGES:

20 Q. And you see the phrase "through
21 sale or other transfer of ownership" --

22 A. I see that.

23 Q. -- in Article 6?

24 A. Yes.

25 Q. Do you understand that to --

1 those to be two types of -- strike that.

2 Do you understand those to be
3 the two types of events that the right of
4 distribution in Article 6 covers?

5 MR. GENNARI: Objection.

6 Outside the scope of his report.

7 THE WITNESS: Yes.

8 BY MR. BRIDGES:

9 Q. There has to be a making
10 available to the public through sale or other
11 transfer of ownership, correct?

12 A. That's what the words say.

13 Q. And it has to be the making
14 available to the public of the original and
15 copies of their works through sale or other
16 transfer of ownership; so it's the right of
17 authorizing the making available to the
18 public of two categories of things, originals
19 of their works and copies of their works,
20 through two types of -- two types of
21 transactions, sales and other transfers of
22 ownership, correct?

23 MR. GENNARI: Objection to the
24 form. Vague and ambiguous. The
25 document speaks for itself. Asked and

1 answered.

2 THE WITNESS: You're asking me
3 to go back 20 years and recall the
4 details. I have not studied this
5 issue for this report, and I -- I wish
6 I had a ready answer for you, but I
7 don't.

8 BY MR. BRIDGES:

9 Q. Okay. Let me ask you to turn
10 to footnote 5.

11 MR. GENNARI: Before you ask
12 the next question, we're already past
13 an hour on the break time, so --

14 MR. BRIDGES: I've got maybe
15 five more minutes.

16 MR. GENNARI: I'd like to take
17 a break every hour if we could.

18 MR. BRIDGES: Sure.

19 BY MR. BRIDGES:

20 Q. I'd ask you to look at
21 footnote 5. It's on page 9 of 10 of
22 Exhibit 4.

23 Did I say footnote 9? I meant
24 to say footnote 5. I thought that's what I
25 said. Do you see footnote 5?

1 A. I see footnote 5.

2 Q. "Agreed statements concerning
3 Articles 6 and 7"?

4 A. I see that.

5 Q. In the context of WIPO treaty
6 making, what are agreed statements?

7 A. Let me read them? May I read
8 them?

9 Q. Can you answer in general what
10 agreed statements are in the context of
11 treaties?

12 A. Oh, yes. They are -- it's
13 almost like legislative history, but it puts
14 the actual language of the article in some
15 sort of historic context.

16 Q. Right. So I'll go ahead and
17 read it as you read it.

18 "As used in these articles, the
19 expressions, copies, and original and copies,
20 being subject to the right of distribution
21 and the right of rental under the said
22 articles refer exclusively to fixed copies
23 that can be put into circulation as tangible
24 objects."

25 Do you see that?

1 A. I see that.

2 Q. So is it your understanding
3 that the right of distribution under the WIPO
4 Copyright Treaty includes a provision for
5 making available in Article 6, correct? The
6 two words "making available" are in the first
7 line of Article 6?

8 A. Yes, I see that.

9 Q. But it's the making available
10 of original -- the original and copies in the
11 text of Article 6, and in the agreed
12 statement in footnote 5, it explains that
13 original and copies refer exclusively to
14 fixed copies that can be put into circulation
15 as tangible objects.

16 Do you see that?

17 A. I see that.

18 Q. Is it -- and it's your
19 understanding that all agreed that the --
20 there need be no change in US law because US
21 law conformed to the provisions of the WIPO
22 Copyright Treaty without need for amendment,
23 correct?

24 MR. GENNARI: Objection.

25 Outside the scope of his report.

1 Calls for a legal conclusion. Vague
2 and ambiguous.

3 THE WITNESS: Let me read, if I
4 may, Article 8, footnote 7.

5 BY MR. BRIDGES:

6 Q. It says, "It is understood that
7 the mere provision of physical facilities for
8 enabling or making a communication does not
9 in itself amount to communication within the
10 meaning of this treaty or the Berne
11 Convention."

12 A. Again, without -- without going
13 back to my archives, this was almost 20 years
14 ago now, I wonder whether or not the making
15 available right in Article 8 was intended to
16 be the corresponding right that's covered by
17 the distribution right in the United States.

18 Q. Well, it's not a making
19 available right. It's a communication right
20 in Section -- in Article 8 of the WIPO
21 Copyright Treaty, correct?

22 A. That's correct.

23 MR. GENNARI: Objection.
24 Misstates his testimony.

25 THE WITNESS: If I -- if I

1 I assume that there's a connection, but I
2 don't recollect at this point.

3 Q. And then "phonorecord" is on
4 page 4, it starts out by saying
5 "'Phonorecords are material objects," and
6 then it goes on. And then the final sentence
7 says, "The term 'phonorecord' includes the
8 material object in which the sounds are first
9 fixed."

10 Now let me ask you to turn
11 to -- and, actually, before I turn, are you
12 aware of any provision in the Copyright Act
13 that defines "copies" as something that is
14 not a material object?

15 MR. GENNARI: Objection.

16 Outside the scope of his report.

17 Calls for a legal conclusion.

18 THE WITNESS: I would have to
19 go back to the statute to verify that
20 point.

21 BY MR. BRIDGES:

22 Q. Are you aware of any exception
23 from the definition of "copies" as material
24 objects as you sit here today?

25 MR. GENNARI: Same objection.

1 THE WITNESS: "Copy" has -- in
2 the context of the copyright law, has
3 many different purposes. For purposes
4 of determining infringement, I'm not
5 certain, as actually I'm certain on
6 the other side, that you don't have to
7 make a physical copy, in terms of
8 something to hold in your hand, to
9 infringe copyright.

10 BY MR. BRIDGES:

11 Q. Of course, because one can
12 engage in a public display to infringe
13 copyright, correct?

14 A. Well, the public performance.

15 Q. Right. Without creating a
16 physical copy?

17 A. Correct.

18 Q. So my question is, are you
19 aware of any definition from the -- strike
20 that.

21 Are you aware of any exception
22 from the definition of "copies" as material
23 objects in the Copyright -- in the Copyright
24 Act?

25 A. As I'm sitting -- I'm sorry.

1 MR. GENNARI: Same objections.

2 THE WITNESS: As I'm sitting

3 here today, I can't point to one.

4 BY MR. BRIDGES:

5 Q. Now let me ask you to turn to
6 Section 106, Exhibit 10.

7 A. I'm looking at 106.

8 Q. All right. Section 106. And
9 the preamble up there says -- the preamble at
10 the beginning of the section that you
11 referred to earlier, says, "Subject to
12 sections 107 through 122, the owner of
13 copyright under this title has the exclusive
14 rights to do and to authorize any of the
15 following:"

16 Correct?

17 A. Correct.

18 Q. So that means that the rights
19 set forth below that preamble in Section 106
20 are subject to various limitations and
21 exceptions in Sections 107 to 122, correct?

22 MR. GENNARI: Objection. Vague
23 and ambiguous.

24 THE WITNESS: That appears to
25 be the case, if I've understood your

1 question correctly.

2 BY MR. BRIDGES:

3 Q. And section -- and Sections 107
4 to 122 operate as limitations or boundaries
5 on the right of the copyright owner. They
6 don't expand the right of a copyright owner.
7 Correct?

8 MR. GENNARI: Objection. We
9 don't have the other sections, 107
10 through 122, in this document, do we?

11 BY MR. BRIDGES:

12 Q. You may answer.

13 MR. GENNARI: In Exhibit 10?

14 BY MR. BRIDGES:

15 Q. You may answer.

16 A. They are limitations on the
17 exclusive rights.

18 Q. And not expansions, correct?

19 A. If I understand "expansions"
20 the way I think you mean it, correct.

21 Q. Let me ask you to turn to
22 paragraph 3 of Section 106. It says, "to
23 distribute copies or phonorecords of the
24 copyrighted work to the public by sale or
25 other transfer of ownership, or by rental,

1 lease, or lending."

2 Do you see that?

3 A. I see that.

4 Q. So please keep that in front of
5 you.

6 Are you aware of any facts in
7 this case suggesting that any Cox subscribers
8 have distributed any material objects?

9 MR. GENNARI: Objection.

10 Outside the scope of his report.

11 THE WITNESS: You focus on
12 "material object," and based on that,
13 I -- I say that I'm not aware of
14 any -- any --

15 Distribution? Was that the
16 word you used?

17 BY MR. BRIDGES:

18 Q. Correct.

19 A. -- distribution of a physical
20 object.

21 Q. Are you aware of any facts
22 suggesting any Cox subscribers have sold
23 anything over the Cox network?

24 A. I've --

25 MR. GENNARI: Objection.

1 Outside the scope of his report.

2 THE WITNESS: I've not seen any
3 evidence of sales.

4 BY MR. BRIDGES:

5 Q. Have you seen any evidence of
6 any transfers of ownership by Cox subscribers
7 in this case?

8 MR. GENNARI: Objection.

9 Outside the scope of his report.

10 THE WITNESS: Again, this is an
11 area of some controversy, some
12 dispute. Is a barter arrangement a
13 transfer of ownership? I give you one
14 of mine if you give me one of yours.

15 BY MR. BRIDGES:

16 Q. Have you seen any evidence of
17 any transfer --

18 A. I would -- I would argue that
19 that is a transfer of ownership.

20 Q. Sorry?

21 A. I would argue that that is a
22 transfer of ownership.

23 Q. I'm asking whether you have
24 seen evidence of any actual transfers of
25 ownership of anything by Cox subscribers in

1 this case.

2 MR. GENNARI: Objection.

3 Outside the scope of his report.

4 Calls for a legal conclusion.

5 THE WITNESS: No.

6 BY MR. BRIDGES:

7 Q. Have you seen any evidence of
8 any rentals by Cox subscribers in this case?

9 MR. GENNARI: Same objections.

10 Outside the scope of the report.

11 Calls for a legal conclusion.

12 THE WITNESS: No.

13 BY MR. BRIDGES:

14 Q. Have you seen any evidence of
15 any leases by Cox subscribers in this case?

16 MR. GENNARI: Same objection.

17 THE WITNESS: By saying no, I'm
18 saying no, since I used the word in
19 the last two questions, I'm not aware
20 of any -- any leases that were
21 negotiated by Cox subscribers.

22 BY MR. BRIDGES:

23 Q. Are you aware of or have you
24 seen any evidence of any lending of anything
25 by Cox subscribers?

1 MR. GENNARI: Same objections.

2 THE WITNESS: Specific evidence
3 of lending? There could be arguments
4 made, and there probably are arguments
5 made, that exchanging information,
6 exchanging copyrighted works in a
7 peer-to-peer environment is lending,
8 but I've not seen any hard evidence of
9 that in this case.

10 BY MR. BRIDGES:

11 Q. By any Cox subscriber?

12 A. By a Cox subscriber.

13 Q. When do you -- what do you
14 understand "lending" to mean?

15 MR. GENNARI: Objection.

16 Outside the scope of the report.

17 THE WITNESS: I would use the
18 word in its normal sense. Letting
19 someone borrow the work and then
20 returning it.

21 BY MR. BRIDGES:

22 Q. A transfer of possession and a
23 retrieval of possession of an item, correct?

24 A. That would be my understanding
25 of the plain meaning of the language.

1 Q. And in a transfer of ownership,
2 a new owner, upon acquiring ownership, takes
3 that ownership away from the old owner who
4 loses ownership, correct, in a transfer of
5 ownership?

6 MR. GENNARI: Objection. Calls
7 for a legal conclusion. Outside the
8 scope of his report.

9 THE WITNESS: I'm not sure
10 ownership comes into the equation.

11 BY MR. BRIDGES:

12 Q. Well, I'm just -- I'm just
13 looking at the term "transfer of ownership"
14 in this language. A transfer generally
15 means, if A transfers to B and B gets it, A
16 no longer has it, correct, because it has
17 been transferred?

18 MR. GENNARI: Objection.

19 THE WITNESS: When you're
20 talking about -- I'm sorry.

21 MR. GENNARI: Same objections.
22 Outside the scope of the report.
23 Calls for a legal conclusion.

24 THE WITNESS: If you're focused
25 on physical objects, yes.

1 BY MR. BRIDGES:

2 Q. And it's also true of
3 intangible rights. If I -- if I transfer to
4 you my -- my -- the sum of \$10 from my bank
5 account to your bank account, I haven't
6 necessarily handed you any currency. I've
7 simply engaged in an electronic transaction
8 by which you have the \$10 and I no longer
9 have the \$10, correct?

10 MR. GENNARI: Objection. Vague
11 and ambiguous.

12 THE WITNESS: I'm hesitant to
13 respond on a hypothetical that -- it
14 sounds plausible, but there could be
15 other considerations, whether or not
16 it was a transfer of ownership, even
17 though it wasn't a \$10 bill.

18 BY MR. BRIDGES:

19 Q. I can transfer a chose in
20 action. I can transfer you a stock
21 certificate and transfer the ownership of
22 stock that the stock certificate represents,
23 correct, and if you have it, then I no longer
24 have it, correct?

25 A. That's a transfer of ownership

C E R T I F I C A T E

I do hereby certify that I am a Notary Public in good standing, that the aforesaid testimony was taken before me, pursuant to notice, at the time and place indicated; that said deponent was by me duly sworn to tell the truth, the whole truth, and nothing but the truth; that the testimony of said deponent was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the deposition is a true and correct record of the testimony given by the witness; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand and official seal this 10th day of August, 2015.

Debbie Leonard

Debbie Leonard, RDR, CRR
Notary Public